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No. 86-407

In the Supreme Court of the United States

OCTOBER TERM, 1986

ALVIN W. DODSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Article 52(a)(2).of the Uniform Code of Military Justice, 10 U.S.C. 852(a)(2), permits a defendant to be convicted by the concurrence of two-thirds of the members of a court-martial panel for an offense with a mandatory minimum sentence of life imprisonment.

2. Whether the court-martial panel selection process and voting requirements for conviction, adopted by Congress pursuant to Art. I, § 8, Cl. 14 of the Constitution, violate the Due Process Clause.

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OPINIONS BELOW

The opinions of the Court of Military Appeals (Pet. App. la-6a, 7a-12a) are reported at 21 M.J. 276 and 21 M.J. 237, respectively. The opinion of the Navy-Marine Corps Court of Military Review (Pet. App. 13a-30a) is reported at 16 M.J. 921.

JURISDICTION

The judgment of the United States Court of Military Appeals (Pet. App. 7a) was entered on January 27, 1986. A petition for reconsideration was denied on July 14, 1986 (Pet. App. 1a). The petition for a writ of certiorari was filed on September 12, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1258(3).

STATEMENT

Petitioner, a member of the United States Marine Corps, was convicted by a general court-martial of premeditated murder, felony-murder, robbery, attempted robbery, conspiracy to commit robbery, and wrongful communication

of a threat, in violation of Articles 80, 81, 118, 122, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 880, 881, 918, 922, and 934. Petitioner was sentenced to confinement at hard labor for life, forfeiture of all pay and allowances, a reduction in pay grade, and a dishonorable discharge. The convening authority reviewed the case and approved the findings and sentence. The Navy-Marine Corps Court of Military Review affirmed the findings and sentence (Pet. App. 13a-30a). The Court of Military Appeals vacated petitioner's felony-murder conviction, but affirmed petitioner's convictions and sentence in all other respects (Pet. App. 7a-12a). The Court of Military Appeals later filed an opinion denying petitioner's motion for reconsideration (*id.* at 1a-6a).

1. The charges against petitioner arose from the robbery and stabbing death of Marine Corporal Murphy in Henoko Ville, Okinawa, during the early morning hours of June 1, 1981. Although there were no eyewitnesses to the crime, circumstantial evidence established petitioner's complicity in Corporal Murphy's robbery and murder. For example, petitioner was one of three men who had threatened and attempted to rob Corporal Murphy earlier that evening outside a local bar in Henoko Ville (Pet. App. 14a; Tr. 391-406).[1] At the time, petitioner was overheard telling Corporal Murphy, "I'm going to get you, man" (Tr. 392, 403). Petitioner and one of his companions, Lance Corporal Garrett,[2] were later seen walking rapidly in the direction

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[1]Immediately after the altercation, Corporal Murphy said that the three men had attempted to rob him, but that they would have to kill him to do so (Tr. 396, 428). One witness to the incident testified that petitioner had a shiny object in his hand, but she could not state that it was a knife (Tr. 392).

[2]Garrett was separately tried and was also convicted. The third defendant, Lance Corporal Chupp, was also tried separately and was acquitted.

of the place where Corporal Murphy's body was discovered (Tr. 476-479). Petitioner subsequently made several incriminating statements showing that he participated in the murder of Corporal Murphy.[3]

2. Pursuant to its authority under Art. I, § 8, Cl. 14 of the Constitution to "make rules for the Government and Regulation of the land and naval Forces," Congress has enacted the Uniform Code of Military Justice (UCMJ), which governs the size, selection process, composition, and voting procedures of courts-martial, as well as the number of peremptory challenges granted to a defendant. Article 16(1)(A), UCMJ, 10 U.S.C. (& Supp. II) 816(1)(A), provides that general courts-martial shall consist of at least five members. Article 25(d)(2), UCMJ, 10 U.S.C. 825(d)(2), charges the court-martial convening authority with selecting as court-martial members "such members of the armed forces as, in his opinion, are best qualified for the duty by

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[3]During his pretrial confinement, petitioner admitted in response to a question from another inmate, Private Weaver, that he had murdered Corporal Murphy, although he immediately tried to neutralize his admission by saying that he was " 'only kidding' " (Tr. 493). Private Weaver later overheard a conversation between petitioner, Garrett, and Chupp in which petitioner said, " 'Fuck that swine. I'm glad we did it. He shouldn't have been fucking around with Garrett anyway' " (Pet. App. 16a; Tr. 493). Finally, during another conversation with Garrett and Chupp, petitioner said, " 'They aren't going to try us for the murder; they are going to try us for the robbery. Because we didn't have any money that weekend, they can't get us for that. If we keep our story straight, NIS [*i.e.*, Naval Intelligence Service] won't be slick enough to catch us' " (Tr. 494). Perhaps referring to the woman who had seen the altercation outside of the bar on the night of the murder, petitioner also said, " 'Fuck that bitch. I'll laugh at her when she comes into the courtroom. She doesn't know anything' " (*ibid.*).

Another witness testified that he overheard Garrett say, "I wish I wouldn't have brought the knife that night. He said nobody was supposed to get hurt" (Tr. 554). A pathologist testified for the prosecution that two weapons were used to murder Corporal Murphy (Tr. 445, 451).

reason of age, education, training, experience, length of service and judicial temperament." Article 25(c)(1), UCMJ, 10 U.S.C. 825(c)(1), allows an enlisted defendant to insist that at least one-third of the court-martial panel be made up of enlisted men equal to or senior in rank to the defendant and from a different military unit. Article 52(a)(2), UCMJ, 10 U.S.C. 852(a)(2), provides for a two-thirds majority vote of members for conviction of all crimes not carrying a mandatory death sentence. Article 41(b), UCMJ, 10 U.S.C. 841(b), allots one peremptory challenge to the prosecution and the accused.

3. Before trial, petitioner moved for the court-martial members to be selected randomly, without regard to their branch of the armed services or their rank, and without regard to the ratio of enlisted personnel to officers (AX 1). The military judge denied the motion (Tr. 166). Sixteen members were detailed by the convening authority to serve on petitioner's court-martial, ten officers and six enlisted persons. After an extensive voir dire of the members (Tr. 228-301), the trial judge sustained six of petitioner's challenges for cause and one of the government's challenges for cause, which resulted in a panel of nine members. Each side then exercised its one allotted peremptory challenge, which further reduced the panel to seven members, consisting of four officers and three enlisted persons.

During the court's instructions to the panel, and without objection by the defense (Tr. 730-739, 806), the court-martial members were charged that a two-thirds majority vote was required to convict petitioner of each of the charged offenses (Tr. 805). The panel found petitioner guilty on all charges, and it later imposed a sentence that included confinement at hard labor for life.

ARGUMENT

1. Petitioner argues (Pet. 5-10) that his murder conviction is invalid because his court-martial panel was instructed that he could be convicted by a two-thirds vote of the panel members. Although Article 52(a)(2) of the UCMJ, 10 U.S.C. 852(a)(2), provides that the concurrence of two-thirds of the members of the court-martial panel is sufficient to convict a defendant for any offense except one in which the death penalty is mandatory, petitioner argues that a separate provision, Article 52(b)(2) of the UCMJ, 10 U.S.C. 852(b)(2), alters the effect of Article 52(a)(2) by requiring the concurrence of three-fourths of the members of the court-martial panel in any case in which the defendant is convicted of a crime for which there is a mandatory life sentence. Petitioner's contention does not warrant review by this Court, for several reasons.

First, petitioner did not object at trial to the instruction that he could be found guilty if two-thirds of his court-martial panel concurred in that finding. Petitioner did not assert that claim until the day after the panel had returned its findings (Tr. 813). In addition, petitioner did not ask to have the panel members polled on their vote. Thus, only the required two-thirds vote for conviction was announced; the actual vote for conviction is not a matter of record, even though the vote may have been unanimous.[4] Accordingly, petitioner has waived his claim by failing to assert it in a timely fashion.

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[4]Article 51(a) of the UCMJ, 10 U.S.C. 851(a), requires that the members vote by secret ballot. Even when more than the two-thirds of the members vote to convict, that fact is not made public (see Tr. 809-810). The petition is therefore somewhat misleading when it states (Pet. 4) that petitioner was convicted "by two-thirds vote." The unopposed instruction to the court-martial panel ensured that there were at least five (of seven) votes for conviction; in fact, there may have been more.

Second, petitioner's contention involves a narrow question of the proper construction of the Uniform Code of Military Justice that has no application beyond the military justice system and that presents no conflict among the circuits. The Court of Military Appeals rejected an identical claim in *United States* v. *Morphis*, 7 C.M.A. 748, 752-754, 23 C.M.R. 212, 216-218 (1957), and *United States* v. *Walker*, 7 C.M.A. 669, 673-675, 23 C.M.R. 133, 137-139 (1957), and the interpretation of the Uniform Code of Military Justice adopted by the military courts and the armed services is entitled to considerable deference (*Middendorf* v. *Henry*, 425 U.S. 25, 43 (1976); *Hiatt* v. *Brown*, 339 U.S. 103, 109 (1950)). In *Morphis* and *Walker*, the Court of Military Appeals reconciled Article 52(a)(2) and Article 52(b)(2) by noting that the first deals with the number of votes required for conviction of particular offenses, while the second deals with the number of votes required for the court-martial panel to impose particular sentences. The two votes occur at different points in the proceedings, the court pointed out, and it is therefore reasonable to treat them separately in the statute. The court found nothing in the language of the UCMJ or its predecessors to justify applying the three-fourths concurrence rule of Article 52(b)(2) to the guilt stage in cases in which life imprisonment is mandatory. See *United States* v. *Walker*, 7 C.M.A. at 673, 23 C.M.R. at 137.

The Court of Military Appeals' decisions in *Morphis* and *Walker* are consistent with the decisions of the federal courts that have considered the relationship between Articles 52(a)(2) and (b)(2) of the UCMJ.[5] Like the Court of

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[5]See *McKinney* v. *Warden*, 273 F.2d 643, 644 (10th Cir. 1959), cert. denied, 363 U.S. 816 (1960); *Anderson* v. *Hunter*, 177 F.2d 770, 771 (10th Cir. 1949); *Stout* v. *Hancock*, 146 F.2d 741, 745 (4th Cir. 1944), cert. denied, 325 U.S. 850 (1945); *Brown* v. *Hiatt*, 81 F. Supp. 647, 650 (N.D. Ga. 1948), aff'd on other grounds, 175 F.2d 273 (5th Cir. 1949),

Military Appeals, those courts have concluded that Articles 52(a)(2) and (b)(2) establish separate and independent majority voting requirements for the guilt and sentencing stages of a court-martial.

Even apart from the deference due to the Court of Military Appeals' construction of the UCMJ, that court's analysis of the statutory scheme is correct. A court-martial is a bifurcated proceeding with separate guilt and sentencing stages, and the members of the court-martial panel must separately decide each question. When capital punishment is the mandatory penalty for a charged crime, the panel members must agree unanimously to convict a servicemember of that offense (Art. 52(a)(1), UCMJ, 10 U.S.C. 852(a)(1)). For any other offense, a servicemember may be convicted by a two-thirds vote of the panel (Art. 52(a)(2), UCMJ, 10 U.S.C. 852 (a)(2)). The sentencing stage then commences. After hearing evidence in aggravation and mitigation, the panel votes on an appropriate sentence. In order to impose a capital sentence, the panel must be unanimous (Art. 52(b)(1), UCMJ, 10 U.S.C. 852(b)(1)); to impose a sentence of life imprisonment or a term of confinement for more than ten years, three-fourths of the panel must agree (Art. 52(b)(2), UCMJ, 10 U.S.C. 852(b)(2)). Any other sentence may be imposed by a two-thirds vote of the panel (Art. 52(b)(3), UCMJ, 10 U.S.C. 852(b)(3)).

The plain language of Article 52(a)(2) and Article 118 of the UCMJ, 10 U.S.C. 852(a)(2) and 918, supports the Court of Military Appeals' conclusion that a defendant may be found guilty of murder by a two-thirds vote of a court-martial panel. Article 52(a)(2) fixes a two-thirds majority

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rev'd on other grounds, 339 U.S. 103 (1950); *Thompson* v. *Sanford*, 79 F. Supp. 584, 585 (N.D. Ga. 1946); *Hurse* v. *Caffey*, 59 F. Supp. 363, 364-365 (N.D. Tex. 1945); see also *Ex parte Campo*, 71 F. Supp. 543, 545 (S.D.N.Y.), aff'd mem. *sub nom. United States ex rel. Campo* v. *Swenson*, 165 F.2d 213 (2d Cir. 1947).

vote requirement for conviction of any offense when capital punishment is not the mandatory penalty, and under Article 118 capital punishment is not the mandatory punishment for murder. If Congress intended that murder would be exempt from the majority vote requirement established by Article 52(a)(2), Congress could easily have drafted the provision in that manner, as it did in the case of Article 52(a)(1) for crimes with a mandatory death penalty. Nothing in the text or legislative history of these provisions, however, shows that Congress intended that result. See H.R. Rep. 491, 81st Cong., 1st Sess. 26 (1949); S. Rep. 486, 81st Cong., 1st Sess. 23 (1949); see also W. Winthrop, *Military Law and Precedents* 377, 395 (2d ed. 1920).

Contrary to petitioner's claim, there is also no anomaly in the relationship between Article 52(a)(2) and Article 52(b)(2). Petitioner's argument overlooks the relevant provisions of the *Manual for Courts-Martial, United States—1984 (Manual)*. The *Manual* provides that the panel must vote on every sentence, even in the case of a conviction for premeditated or felony murder, crimes that carry a mandatory minimum sentence of life imprisonment. Rule 1006(d)(5), *Manual* II-154. If the requisite number of panel members fail to agree on an appropriate sentence, the trial judge may declare a mistrial as to sentence. The case is then returned to the convening authority, who may convene a new panel to consider the appropriate sentence or may order that no punishment be imposed. Rule 1006(d)(6), *Manual* II-154. The *Manual* thus implements the provisions of Article 52(b)(2) by requiring a three-fourths vote to impose a life sentence for premeditated or felony murder, even though the only sentence that a court-martial panel can lawfully impose by that vote is life imprisonment.[6]

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[6]Petitioner's trial took place before the *Manual for Courts-Martial* was revised in 1984, but the version of the *Manual* in effect at the time of his trial also contained the requirements described above. *Manual*

In this case, the panel was not instructed that three-fourths of its members must concur in the sentence of life imprisonment (see Tr. 837-838), and the actual vote on petitioner's sentence was not disclosed at trial (Tr. 843-845). At most, therefore, petitioner would have had a claim that the court-martial panel was not properly instructed at the *sentencing* stage of his case. Petitioner has declined to challenge his sentence, however, even though he was plainly aware of that claim at the time of his trial (Tr. 813, 814). Whatever infirmity there may have been in his sentencing proceeding because of the court's failure to instruct the panel as to the requirement that three-fourths of the members concur in his sentence, the error would have no effect on his conviction, which is the only subject of his challenge in this Court.

2. Petitioner contends (Pet. 11-14) that the selection process, composition, and voting requirements of the court-martial system established by Congress is unconstitutional. That claim does not warrant review by this Court.

The gravamen of petitioner's claim is that the Sixth Amendment right to trial by jury ought to be applied to the military justice system. It is well settled, however, that the

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for Courts-Martial, United States—1969 (Rev. ed.) para. 76b(2), at 13-14 ("[a]ny sentence, even in a case where the punishment is mandatory, must have the concurrence of the required number of members. If the required proportion of the court members are conscientiously unable to reach agreement on a sentence, this fact shall be announced in open session and a mistrial declared. The convening authority may thereafter direct a rehearing on the sentence before a different court."); *id.* para. 76b(3), at 13-14.1 ("[n]o person may be sentenced to life imprisonment or to confinement for more than ten years except by the concurrence of three-fourths of the members present at the time the vote is taken").

right to trial by jury does not apply to court-martial proceedings.[7] As the Court explained in *Ex parte Quirin*, 317 U.S. 1, 39 (1942), Article III, Section 2, of the Constitution and the Sixth Amendment were intended "to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law * * *, but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right."[8] Because petitioner had no Sixth Amendment right to trial by a petit jury, he had no right to trial by a jury chosen from a representative cross-section of the community.[9]

There is, accordingly, no merit to the specific claims that petitioner asserts. Petitioner's conviction is not invalid because his court-martial panel was not randomly selected

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[7]*E.g., O'Callahan* v. *Parker*, 395 U.S. 258, 261 (1969); *Reid* v. *Covert*, 354 U.S. 1, 19-20, 22, 37 n.68 (1957); *Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950); see generally Van Loan, *The Jury, the Court-Martial, and the Constitution*, 57 Cornell L. Rev. 363 (1972); Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293 (1957).

[8]Petitioner's reliance on *Ballew* v. *Georgia*, 435 U.S. 223 (1978) (five-person juries in non-petty criminal cases violate the Sixth Amendment), is misplaced. Nothing in *Ballew* supports petitioner's claim that the Sixth Amendment right to a trial by jury applies to the military. *E.g., Medrano* v. *Smith*, 797 F.2d 1538, 1543-1544 (10th Cir. 1986); *United States* v. *Guilford*, 8 M.J. 598, 601-602 & n.4 (A.C.M.R. 1979), petition denied, 8 M.J. 242 (C.M.A. 1980).

[9]Even if the Sixth Amendment representative cross-section requirement were applicable to the military justice system, petitioner has failed to show that the system for empaneling court-martial members adopted by Congress leads to the "systematic exclusion of a distinctive group in the community" (*Lockhart* v. *McCree*, No. 84-1865 (May 5, 1986), slip op. 10-11). The exclusion, for instance, of members of other branches of the armed forces does not skew the panel in such a way as to deny military defendants the benefit of the common-sense judgment of the military community, nor does it give rise to an appearance of unfairness or deny members of the other branches the opportunity to serve on court-martial panels (see *id.* at 11-12).

from a pool containing all servicemen, including enlisted personnel of the same rank as petitioner. *DeWar* v. *Hunter*, 170 F.2d 993, 997 (10th Cir. 1948), cert. denied, 337 U.S. 908 (1949) (court-martial panel composed exclusively of officers to try an enlisted man does not violate Sixth Amendment); *United States* v. *McClain*, 22 M.J. 124, 128 (C.M.A. 1986) (Sixth Amendment cross-section requirement inapplicable to court-martial proceedings); see *Mendrano* v. *Smith*, 797 F.2d 1538, 1544-1547 (10th Cir. 1986). Moreover, the fact that a military defendant receives only one peremptory challenge is of no significance, since a civilian defendant has no constitutional right to peremptory challenges at all, much less to any specific number of them. *E.g.*, *Batson* v. *Kentucky*, No. 84-6263 (Dec. 12, 1985), slip op. 10; *id.* at 7 (Marshall, J., concurring) (collecting cases); *Stilson* v. *United States*, 250 U.S. 583, 586 (1919).

Although petitioner relies on *Burch* v. *Louisiana*, 441 U.S. 130 (1979), petitioner did not object at trial in a timely fashion to the jury instructions on the ground that the panel's vote must be unanimous, and he did not raise this claim in either appellate court below.[10] Petitioner has therefore failed to preserve that claim for review in this Court. *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, the military courts have consistently rejected the contention that the court-martial system adopted by Congress is invalid because a serviceman does not receive a trial

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[10]See Supplement to Petition for Grant of Review at 25 ("The question before the Court, however, is narrower than whether due process of law prohibits a non-unanimous decision by a court of only seven members. The question before this Court is whether in a case in which conviction carries a mandatory penalty of life imprisonment, Congress meant that a two-thirds vote was sufficient, or whether Congress meant to require a three-fourths vote."); *id.* at 26-28 (presenting the argument made in the petition (at 11-14)); Appellant's Assignments of Error at 55 (same argument as in Supplement at 25); *id.* at 57-59 (presenting the argument made in the petition (at 11-14)).

by jury and because a defendant may be convicted by a two-thirds vote of the court-martial panel.[11] The decisions of the military courts are consistent with the decision of the only federal court of appeals to consider this question in light of *Burch* v. *Louisiana, supra*. *Mendrano* v. *Smith*, 797 F.2d at 1544-1547.

As we explained in our brief in opposition (at 7-15) in *United States* v. *Garwood*, cert. denied, No. 85-175 (Dec. 2, 1985),[12] the court-martial system established by Congress has its roots in the early history of the Nation and is a valid exercise of Congress's authority under Art. I, § 8, Cl. 14 of the Constitution to "make rules for the Government and Regulation" of the armed forces. The military justice system also provides an accused with "a significant recompense" for the majority vote requirement, because no retrial is permitted if the court-martial panel cannot agree on a conviction; in that circumstance, the accused is automatically acquitted (*Mendrano* v. *Smith*, 797 F.2d at 1546). Rule 921(c)(3), *Manual* II-137. Accordingly, the system by which court-martial panels are selected and the non-unanimous verdicts do not deny a servicemember due process of law.

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[11] *United States* v. *Hutchinson*, 15 M.J. 1056, 1063-1064 (N.M.C.M.R. 1983), aff'd, 17 M.J. 156 (C.M.A.), cert. denied, 469 U.S. 981 (1984); *United States* v. *Rojas*, 15 M.J. 902, 919 (N.M.C.M.R. 1983), vacated on other grounds, 17 M.J. 154 (C.M.A. 1984); *United States* v. *Seivers*, 9 M.J. 612, 615 (A.C.M.R.), petition granted on other grounds, 9 M.J. 253 (C.M.A.), aff'd mem., 9 M.J. 397 (C.M.A. 1980); *United States* v. *Yoakum*, 8 M.J. 763, 768 (A.C.M.R.), petition granted on other grounds, 9 M.J. 137 (C.M.A.), aff'd, 9 M.J. 417 (C.M.A. 1980); *United States* v. *Guilford*, 8 M.J. at 601-602 & n.4 (collecting cases); *United States* v. *Montgomery*, 5 M.J. 832, 834 (A.C.M.R.), petition denied, 6 M.J. 89 (C.M.A. 1978); see *United States* v. *Corl*, 6 M.J. 914, 915-916 (N.C.M.R.), aff'd mem., 8 M.J. 47 (C.M.A. 1979).

[12] We have provided petitioner's counsel with a copy of that brief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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